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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 740

BRENDA K. MONROE, *et al.*,

Petitioners,

—v.—

BOARD OF COMMISSIONERS OF THE CITY OF JACKSON, TENNESSEE, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR PETITIONERS

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
MICHAEL J. HENRY
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS, JR.
Z. ALEXANDER LOOBY
McClellan-Looby Building
Charlotte at Fourth
Nashville, Tennessee 37201

J. EMMETT BALLARD
116 West Lafayette Street
Jackson, Tennessee

Attorneys for Petitioners

GERALD A. SMITH
FRANKLIN E. WHITE
Of Counsel

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The district court's opinion is reported at 244 F. Supp. 353, and is printed in the Appendix at pp. 365-389. The opinion of the Court of Appeals is reported at 380 F.2d 955 and is printed in the Appendix at pp. 397-409. An earlier district court opinion in this case is reported at 221 F. Supp. 968, and is printed in the Appendix at p. 33.

Jurisdiction

The judgment of the Court of Appeals was entered July 21, 1967.. The petition for writ of certiorari was filed October 19, 1967, and was granted January 15, 1968. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1).

Question Presented

Whether the courts below erred by approving a school desegregation plan which failed to make reasonable provisions to abolish the dual school system, and by using a standard for judging the plan which failed to recognize the affirmative duty of the school board to disestablish the segregated school system.

Constitutional and Statutory Provisions Involved

This case involves Section 1 of the Fourteenth Amendment to the Constitution of the United States, and 42 U.S.C. § 1983 providing a right of relief in equity for violations of constitutional rights.

Statement of the Case

This is a school segregation case involving the public schools of the City of Jackson, Tennessee.[1] Jackson is a small to medium-sized city in midwestern Tennessee, with a school system of almost 8,000 students, about 60% white and 40% Negro.[2] As early as 1956, leaders of the Jackson Negro community began petitioning the Board of Commissioners to desegregate the schools in compliance with this Court's decision in the *School Segregation Cases*

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[1] An action seeking desegregation of the adjoining Madison County, Tennessee school system is not involved in this petition. The county and city school systems were sued in the same complaint, but the county and city cases were severed and tried separately by the trial court. An appeal involving the county schools was argued and decided in the Court of Appeals with this City case, but no petition for certiorari was filed in the County case.

[2] In 1964-65, there were 3,194 Negroes and 4,610 white pupils in the system (Plaintiffs' Exhibit 26, A. 359).

(*Brown* v. *Board of Education*, 347 U.S. 483, 349 U.S. 294) (A. 357-358). They met with failure until the 1961-62 school year when the board admitted three Negro students to a white school (A. 24). The following year (1962-63), four more Negro students were admitted to a white school (A. 24). Except for these 7 students, the 13 schools in the system remained totally segregated in their student bodies and faculties. In the elementary grades 1-6, there were five white schools (Highland Park, Alexander, Whitehall, Parkview and West Jackson) and three Negro schools (Lincoln, South Jackson, Washington-Douglas). The junior high school grades (7-9) were served by two white schools (Tigrett Jr. High, Jackson Jr. High) and one Negro school (Merry Jr. High). Grades 10-12 were served by a white school (Jackson Senior High) and a Negro school (Merry Senior High—located in the same building with Merry Jr. High).

Petitioners, who are Negro pupils and parents in the Jackson public school system, brought this action January 8, 1963, in the District Court for the Western District of Tennessee. Their complaint alleged that the Jackson Board of Commissioners operated a compulsory racially segregated school system with a dual system of white and Negro schools, and that the individual plaintiffs had been discriminatorily denied admission in white schools in violation of their Fourteenth Amendment rights (A. 3). Petitioners sought injunctive relief to enable the named plaintiffs to attend specified white schools. In addition, they prayed for an order for a "complete plan for the prompt and speedy reorganization of the entire systems of public schools . . . into unitary, nonracial systems of schools . . . [including] a plan for the assignment, education and treatment of students or enrollees on a nonracial basis, the assignment and treatment of teachers, principals, . . . on a

nonracial basis, and the elimination of all and any other discriminations in said systems . . . which are based on race or color" (A. 22). The district court promptly, on January 25, 1963, granted a preliminary injunction requiring the admission of the four plaintiffs to previously white schools. The Board of Commissioners, by answer, denied that the school system was segregated and asserted that seven Negroes had been admitted to formerly all white schools under Tennessee's Pupil Placement Act (A. 23, 24). However, the answer admitted that the Pupil Placement Act was "not adequate as a plan for reorganizing the (City) schools into a nonracial system" (A. 25).

June 19, 1963, District Judge Brown granted plaintiffs' motion for summary judgment and ordered the board to file a desegregation plan (A. 27). The board filed a proposed plan July 19, 1963 (A. 29), and after an evidentiary hearing the plan was approved with modifications in August 1963. (See 221 F. Supp. 968; A. 33-50.) The desegregation plan (A. 29) as modified by the August 20, 1963, judgment of the district court (A.42), provided for the elimination of compulsory segregation rules in five stages with all grades to be affected by the 1967-68 school year. As various school grades were desegregated, the plan provided for the school officials to designate geographical attendance areas to be served by each school. Pupils residing within these areas had the right to attend the schools in their zones (A. 30). Pupils already in schools were permitted to remain where they were until graduation notwithstanding the new zones. Additionally, the school superintendent was granted the power to "grant or require" transfers of pupils to schools other than the school in their zones on application or on his own initiative (A. 31-32). The court also approved—over petitioners' objections of gerrymandering—the board's school attendance zones for elementary

schools. The court held that the board "should have administrative discretion in establishing unitary zones, provided that the zones do not clearly thwart the plan to bring about abolition of discrimination" (A. 39), and that the zones proposed "do not constitute an abuse of this discretion" (A. 40). The court directed (in accord with the plan of gradual desegregation) that zone maps for junior high schools and senior high schools be filed in 1965 and 1966, respectively. In an addendum to the opinion (responding to a new trial motion), the court reiterated its view that the zones were not gerrymandered (A. 46).

After the desegregation plan had been in effect two years, the five Negro schools remained all-Negro as before; 120 Negroes attended formerly white schools. The enrollments by race for the 1964-65 term were:[3]

Elementary Schools	*Bldg. Capacity*	*Negro Pupils*	*White Pupils*	*Total*
Lincoln	875	709	0	709
South Jackson	525	589	0	589
Washington-Douglas	525	434	0	434
Highland Park	760	0	590	590
Parkview	750	1	654	655
Whitehall	315	16	308	324
West Jackson	500	14	453	467
Alexander	750	87	628	715
Junior High Schools				
Merry Jr. High	700 (+120)[4]	752	0	752
Tigrett Jr. High	725	0	699	699
Jackson Jr. High	650	1	431	432
High Schools				
Merry Senior High	—	590	0	590
Jackson Senior High	—	1	847	848
		3,194	4,610	7,804

[3] These enrollment figures are from Plaintiffs' Exhibit 26 (A. 359-364); building capacity figures are from A. 81-89, 143.

[4] The board decided in the Spring of 1965 to construct 4 new rooms to accommodate 120 more pupils at Merry.

In September 1964, when the plan was beginning its second year of operation, the Negro plaintiffs filed a Motion for Further Relief and to Add Parties in which they attacked the administration of the plan's transfer provisions as racially discriminatory and again charged that the attendance zones were gerrymandered (A. 51). Twenty-seven Negro children who complained that they had been denied transfer to white schools were permitted to intervene as plaintiffs, and the court ruled that plaintiffs could reopen the gerrymandering issue, as well as a faculty desegregation prayer which had previously been deferred (Pretrial order of 9/28/64; A. 92). The board filed a map (reproduced at A. 105) proposing zones for the three junior high schools and requested the court's approval (A. 104-105). Plaintiffs objected that the zone lines were drawn to perpetuate racial segregation and asked that the board be ordered to present new zones (A. 106). By a further motion plaintiffs sought the desegregation of all remaining grades in September 1965, and the elimination of discrimination in teacher in-service training programs and extracurricular activities (A. 109). The district court heard evidence on these matters on May 28 and June 18, 1965 (A. 126-358).

The Superintendent of Schools, Mr. C. J. Huckaba, testified that the elementary and junior high school zones were prepared by considering such factors as the location of the schools, the size of the buildings, the location of the children and an effort to fit the number of students to the capacity of the schools (A. 132). The petitioners presented two experts in the field of education who testified that the elementary and junior high school zones proposed by the board were racially gerrymandered to achieve a high degree of racial segregation. Petitioners' experts were Dr. Roger W. Bardwell, then Superintendent of Schools

of Elk Grove Township, Illinois, and Mr. Merle G. Herman, then Assistant Superintendent of Schools in Villa Park, Illinois.[5] Dr. Bardwell and Mr. Herman conducted a study (Plaintiffs' Exhibit No. 12) which was "designed to discover if the school zone lines . . . have been so drawn to obstruct the racial integration of the city's schools" and also to answer "whether the free transfer policy as administered has fostered additional segregation in the schools" (Exhibit 12, Introduction). The experts prepared a series of exhibits, consisting of plastic overlay maps which may be viewed in booklet form or projected on a screen by an overhead projector (Plaintiffs' Exhibits 12-21). The exhibits locate all pupils attending the schools by race on maps showing the schools and zone lines. The procedure used in preparing the exhibits was a standard method which Dr. Bardwell said he used in presenting similar data to his own Board of Education (A. 213). Dr. Bardwell and Mr. Herman reached the following "conclusion" in their study (Exhibit 12):

> "These exhibits represent an actual picture of the total elementary school population and the total junior

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[5] Dr. Bardwell's qualifications included B.S., M.S., and Ph.D. degrees from the University of Wisconsin in public school administration, fifteen years' experience in school administration, and substantial experience in school building planning and zoning. The school district where he had been superintendent five years was approximately the same size as the Jackson system (A. 207-208).

Mr. Herman's qualifications included a B.A. from McKendree College, and an M.A. and completion of most doctoral requirements at Washington University in St. Louis. His experience included three years' public school teaching, seven years' public school administration, and ten years college teaching in the field of education. During the period in which he was a college faculty member, he participated in many school surveys in a number of different states, including zoning problems as part of those surveys. The system where he was Assistant Superintendent was also approximately the same size as the Jackson City school system (A. 246-247).

high school population located on maps as near to the pupil's actual residence as possible. Elementary school zone lines have also been indicated, as well as two exhibits (Nos. V and VI) which depict the proposed junior high school boundaries. It is possible to graphically examine the actual school zoning and attendance situation in Jackson, Tennessee.

"Examination of this situation reveals:

(1) That elementary school attendance zones have been gerrymandered to create racially segregated elementary schools.

(2) Proposed junior high school attendance zones are also drawn to perpetuate racially segregated schools at the junior high schools, grades 7, 8 and 9.

(3) The present transfer policy seems to mitigate against desegregation of the Jackson schools. Large number of white children living in predominantly negro school zones have been permitted to transfer out of these zones to white or predominantly white schools."

The three junior high schools in Jackson had all been constructed during the period after 1955 during which the Board was operating a compulsory segregated school system contrary to the decision in the *School Segregation Cases* (A. 232). Tigrett Jr. High, formerly all-white, is in the western part of Jackson; Merry, still all-Negro, is in the center of town; and Jackson Jr. High, formerly all-white, is in the southeastern part of the city (A. 378). The zone designated for the all-Negro Merry Junior High School is an irregularly shaped area, described as "sort of an hour glass shape," with a wide top, narrow center, and

wide bottom (A. 290). The lines were drawn "consistently between the Negro and white populations" (A. 291) and the Merry zone thus included most of the Negro junior high students but very few white students. The Bardwell-Herman study concluded "that the boundary zones for junior high school attendance have been drawn with the goal in mind to preserve racially segregated junior high schools to a large degree" (Plaintiffs' Exhibit 12, see text accompanying Exhibit V).

In developing these zones, as well as the elementary zones, the superintendent of schools apparently did not undertake to find out how many junior high and elementary students there were in the city and attempt to match the numbers of students to the capacities of the respective schools, in spite of affirming that he used educational considerations such as capacity of schools in formulating the zones. The only evidence of a count of students which he was able to offer was a racial residential census of all children aged 1-18 in the city, and not a count of relevant age groups for junior high school and elementary school zone planning (A. 129, 141, 145-146, 155, 162, 167, 182-183).

Analyzing a racial residential map of the city showing the locations of the residences, and the race, of all junior high students in the school system (Trial Exhibit 19, A. 211), plaintiffs' educational expert Merle Herman concluded with regard to the junior high school zones: "There seems to be a very distinct tendency for the lines to follow the residences of Negroes and whites—in other words, separating the two. Where there is a large Negro population, there tend to be lines drawn to maintain segregation in the schools that serve those areas" (A. 250).

After the desegregated junior high school zones were announced for the following year in late 1964, and after

the school system had discovered from the 1964-65 enrollment figures that all-Negro Merry Junior High School, which then accommodated all but one of the Negro junior high school students in the city, was over capacity, the Board of Commissioners decided in the spring of 1965 to construct four additional classrooms at Merry so as to increase its capacity by 120 (A. 143, 184). This decision was made despite the facts that (1) *the enrollments of the two previously all-white junior high schools were approximately 300 students under capacity,* and (2) *the elementary school enrollment figures indicated that total junior high enrollment for the system would remain constant at about 100 students above the present enrollment for at least the next four years* (A. 143, 259-260).

When asked whether based on his experience no white children could be expected to enroll in Merry Junior High School and would it not therefore remain all-Negro, the Superintendent of Schools said, "Judging on the basis of what has happened up to now, that might be the case. . . . I imagine it will be predominantly Negro" (A. 185-186). He also expected that the small number of Negro students from the other two zones of the heretofore all-white junior high schools would continue coming to Merry, something the board's transfer policy would encourage (A. 186). The superintendent attempted to justify the construction of an addition to Merry Junior High by pointing out that all-Negro Merry Senior High School (in the same building), was growing and might need some of the rooms presently used by the junior high school. *But he also admitted that the all-white senior high school (not yet then desegregated) was 249 students under capacity* (A. 186).

With respect to the elementary schools, Dr. Bardwell testified that his analysis showed that "if geography were the main criterion for the zoning of the schools, why most

all of the schools would be integrated with the exception of Highland Park, and Lincoln would be predominantly Negro, but the balance of the schools would be integrated to a much greater degree than they are" (A. 219-220; see also, Plaintiffs' Exhibit 12, text accompanying Exhibit VII).

Dr. Bardwell was unequivocal in his observation about the board's proposed zones:

> I said that the boundary lines were drawn so that the majority of the schools remained highly segregated. That was my conclusion. (A. 236)

Mr. Herman agreed (A. 254):

> Well, the elementary school lines are built in such a way that they tend to promote segregation. One can never deal with the motivation behind them. It is just an apparent type of thing that strikes you when you look at the information that we have put together.

Plaintiffs proposed a specific plan for the junior high schools which would have produced three integrated junior high schools. Plaintiffs' educational expert Merle Herman explained that a standard basis for drawing junior high school zones was the "feeder" principle. By this principle, junior high school zones are based on elementary school zones and are composed by clustering several such zones so that all students from the same elementary school go on to attend the same junior high school (A. 248-251, 255, 293-296).

Mr. Herman concluded that using the accepted "feeder" principle, the existing elementary schools in the city were located so that they could be conveniently clustered into

zones to produce three completely integrated junior high schools. The proposed feeder zoning plan was: (1) Parkview (white), Washington-Douglass (Negro), and Whitehall (white) elementary school zones to constitute the zone for Jackson Junior High School; (2) Highland Park (white), West Jackson (white), and South Jackson (Negro) elementary school zones to be the zone for Tigrett Junior High School; and (3) Alexander (white) and Lincoln (Negro) elementary school zones to be the zone for Merry Junior High School (A. 255, 293-296). Each elementary school is located conveniently to the proposed junior high school, and the capacities of the elementary schools were matched to the junior high schools (A. 255, 293-296). Mr. Herman concluded that by drawing the zones in accordance with the "feeder" principle, "the junior high school zones would be developed objectively, without regard to the racial character of the neighborhood" and "from an educational point of view, it would be sound" (A. 255).

Transfer Policy. The original plan of desegregation approved by the district court in 1963 (A. 371-372) provided that any transfer policy could be adopted as long as it did not have as its purpose the delay of desegregation. The district court found in 1965 that the school system had administered its transfer policy in the following manner: "They have allowed white pupils as a matter of course to attend schools, outside of their unitary zones, in which white pupils predominate, and have allowed Negro pupils as a matter of course to attend schools, outside of their unitary zones, attended only by Negroes but they have denied Negroes (and specifically intervening plaintiffs) the right to attend predominantly white schools outside of their unitary zones" (A. 372). In other words, the board was using, up through 1965, the "minority to majority" racial

transfer policy which had been condemned by this Court in 1963 in *Goss* v. *Board of Education*, 373 U.S. 683 (1963).[6]

Dr. Bardwell pointed out that where the Board had zoned all of the schools in such a way that their enrollments were conspicuously either predominantly white or almost all-Negro, and thus preserved the racial identity of the schools as they were under the dual school system, the availability of the free transfer option caused the racial identification of the schools to become even more pronounced by permitting the remaining students of the minority race in each school to transfer out. He indicated that where the school system had conferred racial identities on individual schools, it would be expected that minority students would transfer out of those schools because they were of the minority race and this was confirmed by the fact of an abnormally large number of transfers within the system (A. 223-224, 238-239). Merle Herman pointed out that the effect of a free transfer system superimposed on racially identified schools would operate "to maintain whatever the attitude structure is of the people who have children in those schools: and the attitude toward integration was obviously unfavorable because of the large number of minority to majority transfers (A. 249-250). He explained: "If zoning would not accomplish what some people might consider to be a proper solution to their own personal problems, they could then use transfer as a means by which they could solve their problems" (A. 250). Mr.

[6] Other aspects of the system's transfer policy were also administered in accordance with the principle of a segregated dual school system. The Jackson city school system admitted 385 students from surrounding Madison County and all white students were assigned to schools which were all-white or predominantly white and all Negro students to schools which were all-Negro (A. 255-257; Plaintiffs' Exhibit 20). County transferees of the predominant race in any particular school were apparently given priority in assignment over city students of a minority race who actually resided in the zone of that school (A. 256-257).

Herman concluded that since "It is an accepted fact here, I think, that white children attend white schools and Negro children attend Negro schools," that even though a completely open transfer policy was superimposed on the board's junior high school zones based on race, "segregation will continue to exist" (A. 253).

The Bardwell-Herman study of the junior high school zones indicated how the transfer plan operated with the zones to achieve segregation. As stated in the study (Plaintiffs' Exhibit 12, text accompanying Exhibit VI):

> This exhibit indicates the possibility of using an open transfer plan to promote an almost completely segregated school system at the junior high level because of the gerrymandered school zone lines and relatively few children to be granted transfer to achieve a high degree of segregation.

This "high degree of segregation" was achieved notwithstanding the fact that the white junior high school population "distributes itself over the entire city" because the Negro junior high population "distributes itself in the center of the city" (Plaintiffs' Exhibit No. 12, text accompanying Exhibit V). When most of the Negroes in Jackson were zoned into Merry Junior High zone, and the few whites living in the zone were permitted to transfer out, an all-Negro school was the result.

The district court rendered an opinion July 30, 1965 (A. 365; 244 F. Supp. 353), and an order on August 11, 1965 (A. 390). The court held that the board's transfer policy had been administered in an unconstitutional manner in violation of *Goss* v. *Board of Education*, 373 U.S. 683 (1963) (A. 372). The court ordered that if the defendants continue the policy of allowing all pupils transfers to

schools where they will be in a racial majority, they must also allow pupils to transfer to attend schools where they will be in a racial minority (A. 392-393). The court also ordered that each pupil be required to register in the school in his zone before applying for a transfer (A. 393).

Judge Brown ruled that some of the elementary school zones "appear to be gerrymandered" (A. 393) and ordered that boundaries separating three pairs of white and Negro schools be adjusted. Each adjustment resulted in placing adidtional Negro pupils into formerly white zones. But, the court rejected the claim that junior high school zones were gerrymandered and approved the board's proposed zones (A. 394).

The court ordered that desegregation be accelerated to cover all junior high grades in 1965-66 and all grades in 1966-67 (A. 394). Relief requiring integration of faculties was denied, except that the court ruled that in 1966-67 the board should seek teachers to volunteer for non-segregated assignments (A. 394). Jurisdiction of the cause was retained "pending full implementation of desegregation" (A. 396).

Judge Brown's opinion began by stating that the law was not clear "as to whether the Constitution requires only an abolition of compulsory segregation based on race or requires something more" (A. 366). He thought this a question that "must first be answered before we can deal with the assignment and transfer issue and the gerrymandering issue" (A. 366), and after some discussion, decided that segregation resulting from "purely voluntary choice" or resulting from "'honestly' arrived at geographical zoning" did not violate the Constitution: "the Constitution does not require integration . . . it only requires the abolition of compulsory segregation based on race" (A. 371). The court stated its reliance upon the

famous dictum of *Briggs* v. *Elliott*, 132 F. Supp. 776 (E.D. S.C. 1955).

Reasoning from this premise, Judge Brown disregarded the testimony and desegregation proposals of plaintiffs' experts *because they sought "integration"*:

> . . . [T]he value of the testimony of these experts was undercut by the fact that they assumed that it is the duty of defendants to maximize integration because of educational benefits that would, in their opinion, flow therefrom. The value of their testimony with respect to elementary schools was further somewhat undercut because their maps were aimed to show the amount of *de facto* segregation that has resulted after two years under the plan. However, in view of voluntary transfers by white and Negro pupils, the degree of actual segregation in these schools does not itself show that the zones are gerrymandered. The value of the testimony of these experts with respect to junior high schools was somewhat undercut because they not only again assumed a duty to maximize integration but also assumed that defendants had the duty to adopt a "feeder" system whereby certain elementary schools would send their graduates only to a particular junior high. (A. 376)

The Negro plaintiffs appealed and the Court of Appeals for the Sixth Circuit affirmed except with respect to the faculty segregation issue, on July 21, 1967 (A. 397). The court below asserted that the:

> . . . Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan. (A. 399)

The court stated that the *Brown* decision prohibits "only enforced segregation" (*id.*), and that it would apply the same rule it had applied in a Cincinnati case where the schools were desegregated long before *Brown* (A. 399-400). It said:

> However ugly and evil the biracial school systems appear in contemporary thinking, they were, as *Jefferson, supra* [372 F.2d 836 (5th Cir. 1966)] concedes, de jure and were once found lawful in *Plessy* v. *Ferguson,* 163 U.S. 537 (1896), and such was the law for 58 years thereafter. To apply a disparate rule because these early systems are now forbidden by *Brown* would be in the nature of imposing a judicial Bill of Attainder. (A. 400-401)

The court then stated its approval of the trial judge's decision that the junior high school zones were not gerrymandered. The trial court decision refusing relief on the faculty desegregation question was reversed and the issue remanded for reconsideration in light of *Bradley* v. *School Board,* 382 U.S. 103 (1965), and *Rogers* v. *Paul,* 382 U.S. 198 (1965).

The record herein contains no enrollment figures indicating the results of the plan's operation while the case has been pending on appeal. However, published data reflects that during the 1966-67 school term, Jackson's five Negro schools remained all-Negro, while 475 Negro students attended racially mixed schools and 2,730 remained in all-Negro schools.[7] In the current 1967-68 school year, 615

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[7] Respondents' Brief in Opposition to Certiorari, p. 4, filed November 1967; see also, State of Tennessee, Department of Education, Equal Educational Opportunities Program, *Fall 1966 Desegregation Report on Tennessee's Public Elementary and Secondary Schools* (compiled from reports to the U. S. Office of Education).

Negro students attend mixed classes while 2,613 are in all-Negro schools.[8]

Summary of Argument

I. *Brown* v. *Board of Education,* 347 U.S. 483 (1954); 349 U.S. 294 (1955), directs the district courts to consider the adequacy of school desegregation plans to eliminate racial discrimination in public school systems. School officials have an affirmative duty to initiate desegregation. *Cooper* v. *Aaron,* 358 U.S. 1 (1958).

The courts below applied an erroneous legal standard in appraising the Jackson Board's desegregation plans by rejecting the argument of petitioners that the board had an affirmative duty to abolish the dual system. School segregation plans should be judged by whether they are reasonably designed to convert dual systems into unitary systems. Adequate plans should desegregate both formerly all-white and formerly all-Negro schools. Jackson's plan left the all-Negro schools intact while permitting a few Negroes to enter formerly all white schools. The courts below appraised the plan and the evidence by reference to a misconception of the applicable law which rejected the notion that school boards are affirmatively obligated to disestablish patterns created by the segregation laws and practices. Other courts of appeals have applied more appropriate standards for appraising desegregation plans. *United States* v. *Jefferson County Board of Education,* 372 F.2d 847 (5th Cir. 1966), affrmed en banc, 380 F.2d 385 (5th Cir. 1967), cert. den. 389 U.S. 840. *Kelley* v. *The Altheimer Arkansas Public School District No. 22,* 378 F.2d 483 (8th Cir. 1967); *Board of Education of Okla-*

[8] *Ibid.*

homa City Public Schools v. *Dowell*, 375 F.2d 158 (10th Cir. 1967), cert. den. 387 U.S. 931.

II. The desegregation plan proposed for Jackson, Tennessee, including particularly the junior high school zoning arrangements and the transfer plan, was not reasonably designed to abolish the dual school system. Plaintiffs made an unrebutted showing that the junior high school zones were racially gerrymandered, and that the transfer policy operated with the racial zones to insure a high degree of segregation. The school board's construction policies complemented the zoning arrangements to promote segregation. Having found gerrymandering at the elementary school level, the trial court should have treated the oddly-shaped junior high school zones with great suspicion. Plaintiffs proposed feeder plan would have desegregated each of the city's junior high schools. The court should have ordered this plan or some other arrangement equally likely to desegregate the system. If the record is not deemed sufficient to justify the immediate disapproval of the board's plan, at the least the trial court should be directed to reappraise the case in view of the appropriate standard, e.g. the requirement that school boards take affirmative steps to abolish the dual system.

ARGUMENT

Introduction

This case presents important questions relating to the implementation of this Court's decision that racial segregation in the public schools violates the Equal Protection Clause of the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483 (1954); 349 U.S. 294 (1955). In the second *Brown* decision, *supra*, the Court directed that the lower federal courts "consider the adequacy of any plans that the defendants may propose . . . to effectuate a transition to a racially nondiscriminatory school system". (349 U.S. at 301). Subsequently the Court emphasized the affirmative duty of school authorities, saying that they "were thus duty bound to devote every effort toward initiating desegregation and bringing about the elimination of racial discrimination in the public school system". *Cooper* v. *Aaron*, 358 U.S. 1, 7 (1958). The courts below, in the instant case, approved a desegregation plan (proposed by local school officers and objected to by Negro parents) holding that the plan fully complied with the board's obligations to implement *Brown, supra*. Petitioners submit, first, that both courts below applied an improperly restrictive legal standard for judging the adequacy of the desegregation plan, by rejecting the idea that equity courts are obliged to require affirmative efforts to abolish the dual segregated school system. Second, it is urged that the Jackson plan was demonstrated to be inadequate because the school zoning and pupil transfer arrangements were not reasonably calculated to abolish the dual system which had been created under segregation laws and practices. Alternately, it is submitted, that if the Court does not find the plan inadequate on this record, at the least

the cause must be remanded to the trial court for reappraisal of the plan's features using a correct legal standard.

I.

The Courts Below Applied an Erroneous Legal Standard in Reviewing the Adequacy of the Jackson Desegregation Plan.

Both courts below deemed the definition of the basic constitutional standard to be applied in reviewing a proposed desegregation plan to be the decisive matter at issue. Petitioners' position on this question has been variously stated and characterized by respondents and by the courts below; we state it on our own terms in the following paragraph.

Because the Jackson school officials have established an unconstitutional dual system of segregated schools, it is their affirmative duty to abolish the dual system. Abolishing the dual system involves desegregating the all-Negro schools as well as the all-white schools. The *Brown* decision held that "segregation of children in public schools solely on the basis of race . . . deprive[s] the children of the minority group of equal educational opportunities." (347 U.S. at 493). "The governmental objective of ['converting the dual system of separate schools for Negroes and whites into a unitary system'] . . . is—educational opportunities on equal terms to all." [9] "The criterion for determining the validity of a provision in a school desegregation plan is whether the provision is reasonably related to accomplishing this objective." [10] It is not suffi-

[9] *United States* v. *Jefferson County Board of Education*, 380 F.2d 385, 390 (5th Cir. 1967).

[10] *Id.*

cient for a court to consider merely the abstract constitutionality or reasonableness of a desegregation plan's provisions. The Court should judge whether, when viewed in a practical context, the provisions are reasonably calculated to abolish the dual system of white and Negro schools speedily and effectively and to the greatest extent feasible in the circumstances. Finally, the plan must be tested in actual operation "by measuring the performance —not merely the promised performance—of school boards in carrying out their constitutional obligation 'to disestablish dual, racially segregated school systems and to achieve substantial integration within such systems' ".[11]

We urge that these propositions are well supported by decisions in the lower courts which have been congenial to implementation of the *Brown* decision. The contrary position of the courts below should be repudiated. The essence of the matter is that the courts below have declined to accept the argument that the school board has an affirmative duty to disestablish the segregated system.

The District Judge emphasized the well-known dictum enunciated by Judge Parker in *Briggs* v. *Elliott*, 132 F. Supp. 776 (E.D.S.C. 1955) six weeks after the second *Brown* decision, that the Constitution "does not require integration". *Briggs* sounded the call for resistance to *Brown*. It was an attempt to narrow the scope of the opinion so as to almost deprive it of meaning. *Briggs* has been argued as the supporting foundation for almost every evasive effort to subvert *Brown* which has come before the courts. It has never been recognized in this Court, and has quite properly been repudiated as inconsistent with *Brown* in numerous recent cases in the courts of ap-

[11] *United States* v. *Jefferson County Board of Education*, 372 F.2d 847, 895 (5th Cir. 1966), affirmed en banc, 380 F.2d 385 (5th Cir. 1967), cert. den. 389 U.S. 840 (1967).

peals. See e.g. *United States* v. *Jefferson County Board of Education, supra,* 372 F.2d at 846, 861-873; 380 F.2d at 389; *Kemp* v. *Beasley,* —— F.2d —— (8th Cir. No. 19,107, Jan. 9, 1968); *Kelley* v. *The Altheimer, Arkansas, Public School District No. 22,* 378 F.2d 483, 488 (8th Cir. 1967).

The holdings by the trial court reject the idea of an affirmative obligation by the school board to abolish the dual system in several ways. The court used its conclusion that the Constitution did not require "integration" to justify its disregard of the careful study made by petitioners' expert witnesses who testified that the Jackson school zones were racially gerrymandered. Their presentation was disregarded because the Court thought their testimony assumed the desirability of "integration". Similarly, the court, took the view that school board discretion in establishing attendance zones "should not be overridden unless it constitutes a clear abuse of this discretion" (A. 46). The Court thus limited its inquiry about the zones to a search for an abuse of discretion without any expressed indication of concern for the practical impact of the proposed zones on the separation of the races in the school system. Uncontradicted evidence that the zone lines maximized the racial separation was disregarded.

The trial court's standard for appraising the desegregation plan was seriously in error in that it failed to recognize that a prime objective of the desegregation plan must be to accomplish the actual desegregation of the schools and the elimination of the dual system. The trial court's view focused entirely on whether the desegregation plan used non-racial and non-discriminatory mechanisms for assigning pupils and disregarded the practical impact of these rules on the pre-existing dual system. A principal feature of the dual system is the existence of a number of all-Negro schools. Obviously abolition of the dual sys-

tem of separate white and Negro schools should include desegregation of both sets of schools and the elimination of racially identifiable schools. But the Court approved a plan which was manifestly designed to preserve the all-Negro schools intact, and rejected petitioners' experts' proposal to desegregate all junior high schools by a feeder system, saying that their plan was intended to "integrate" the schools.

The Court of Appeals also characterized petitioners' arguments as a demand for "compulsory integration". The Court said it was unfair and impermissible to impose a duty on the Jackson school board which had established segregation under the aegis of *Plessy* v. *Ferguson*, 163 U.S. 537 (1896), that was not imposed on a school board that had no history of compulsory segregation. By so defining the problem the Sixth Circuit also refused to follow the legal rule stated in *United States* v. *Jefferson County Board of Education, supra*, that there is an affirmative duty placed on school boards to devise plans to abolish the dual system.

The Court of Appeals approved the trial judge's opinion which it said "concludes that the Fourteenth Amendment did not command compulsory integration of all of the schools regardless of an honestly composed unitary neighborhood system and a freedom of choice plan" (A. 399). We think this formulation mistakes the crucial issues. The vital inquiry in appraising a plan intended to implement the *Brown* decision is not merely whether school attendance zones are demonstrably dishonest. The central inquiry ought to be whether the zones are reasonably designed to abolish the segregated system. If the Board's duty is to "devote every effort toward initiating desegregation" (*Cooper* v. *Aaron, supra*, 358 U.S. at 7), surely this duty must include something beyond merely refrain-

ing from drawing dishonest, plainly arbitrary, or segregationist zones. There is a duty to make a reasonable effort to actually desegregate those schools which the state previously established and maintained for one race only.

Pupil transfer rules adopted as part of a desegregation plan should also be required to meet a similar test. In this case the trial court ruled that transfer applications must be granted to all without discrimination and enjoined the board's former practices which it said were racially discriminatory. The court left it open to the Jackson system to continue a transfer arrangement by which every white pupil zoned into a Negro school area transferred out of his zone to a white school and thus perpetuated the all-Negro schools. Experience showed that every white child who was zoned into a Negro school had sought and been granted a transfer to a white school. Everyone —all the parties and the courts below—fully understood and expected that this pattern, which has held true throughout the south, would continue and that the all-Negro schools would remain all-Negro notwithstanding the fact that white pupils did live in the zones designated for these schools. It was error, we submit, for the courts below to approve a transfer arrangement which was thus manifestly designed and expected to defeat the objective of eliminating the dual system.

The appropriate standard for appraising desegregation plans is illuminated by *Board of Education of Oklahoma City Public Schools* v. *Dowell et al.*, 375 F.2d 158 (10th Cir., 1967), *cert. den.* 387 U.S. 931, affirming *Dowell et al.* v. *School Board of Oklahoma City Public Schools*, 219 F. Supp. 427 (W.D. Okla. 1963) and 244 F. Supp. 971 (W.D. Okla. 1965). The Court of Appeals for the Tenth Circuit was confronted with a school system which had announced a formal desegregation plan by unitary zoning in 1955.

Nevertheless, the unitary zoning plan had preserved a number of all-Negro schools because of racially designed building locations, racial residential segregation, and a racial "minority to majority" transfer plan. At the time of the final district court decision in 1965, 80% of the Negro students in the system were still attending schools which were all-Negro or at least 95% Negro.

The Oklahoma district court, after ordering a study by a panel of independent educational administrators, required the school system to take specific and affirmative actions recommended by the panel to begin the process of disestablishing segregation, including: (1) a consolidation of the attendance districts and changes in the grade structures of two pairs of nearby six-year secondary schools so as to completely integrate the four schools, and (2) adoption of a transfer plan by which any student who was in the racial majority in any school in the system could transfer as a matter of right to any other school in which he would be in the racial minority. The Tenth Circuit held that "under the factual situation here we have no hesitancy in sustaining the trial court's authority to compel the board to take specific action in compliance with the decree of the court so long as such compelled action can be said to be necessary for the elimination of the unconstitutional evils pointed out in the court's decree." 375 F.2d at 166.

Judge Lewis, concurring, explained the Court's view that since compulsion was used to maintain the system of segregation, the compulsion inherent in school assignment policies could properly be used to disestablish segregation:

> I have no quarrel with the statement that forced integration when viewed as an end in itself is not a compulsion of the Fourteenth Amendment. But any claimed right to disassociation in the public schools

must fail and fall. If desegregation of the races is to be accomplished in the public schools, forced association must result, not as the end sought but as the path to elimination of discrimination. And, to me, the argument that racial discrimination cannot be eliminated through factors of judicial consideration that are based upon race itself is completely self-denying. The problem arose through consideration of race; it may now be approached through similar but enlightened consideration. 375 F.2d at 169.

In the second *Brown* decision, 349 U.S. 294 (1955), this Court directed that "in fashioning and effectuating the decrees [requiring desegregation], the courts will be guided by equitable principles." 349 U.S. at 300. The general equity principle is that there is no wrong without a remedy, and therefore equity courts have broad power to provide relief and are obligated to do so. The test of the propriety of measures adopted by such courts is whether the required remedial action reasonably tends to dissipate the effects of the condemned actions and to prevent their continuance. *Louisiana* v. *United States*, 380 U.S. 145 (1965). An example of the application of this equitable principle is in the antitrust area, where it has been held to require the complete dissolution of large national business enterprises which had been created by illegal monopolization, when there was no other way to counteract the effects of such illegal monopolization. *United States* v. *Standard Oil Co.*, 221 U.S. 1 (1910); *Schine Chain Theatres* v. *United States*, 334 U.S. 110 (1948). Similarly, it has been held to require that federal courts supervise the redrawing of state legislative districts when there is no other way to counteract the effects of population disparities in existing state legislative districts. *Reynolds* v. *Sims*, 377 U.S. 533 (1964).

As indicated above, decisions of the Courts of Appeals for the Fifth, Eighth, and Tenth Circuits have held that this equitable doctrine, as applied to the problem of remedy for the unconstitutional creation and operation of a segregated public school system, requires a school board to undertake affirmative action purposed to disestablish segregation completely, and that the standard for determining the completion of desegregation is that the formerly Negro schools must cease being identifiable as Negro schools. The creation and operation of separate schools for Negroes was the condemned action, and the test of the propriety of remedial action to be required by a court is thus whether it will disestablish the existence of the Negro schools, i.e. integrate Negro students.

This Court suggested in the second *Brown* decision the scope of school system policies which would have to be changed in order to disestablish segregation, when it said that "to effectuate this interest may call for elimination of a variety of obstacles," and directed the district courts supervising the re-organization of dual school systems to "consider problems related to administration, arising from the physical condition of the school plant, the school transportation system, personnel, revision of school districts, and attendance areas into compact units to achieve a system of determining admission to the public schools on a nonracial basis, and revision of local laws and regulations which may be necessary in solving the foregoing problems." 349 U.S. at 300-301.

Since this Court's announcement of the second *Brown* decision in 1955, the lower federal courts have considered and ordered a variety of specific remedies which constitute affirmative actions and policies purposed to disestablish

segregation.[12] See, e.g., *United States* v. *Jefferson County, Board of Education, supra; Kelley* v. *Altheimer, supra; Dowell* v. *School Board of Oklahoma City, supra; Carr* v. *Montgomery County Board of Education (Ala.)*, 253 F. Supp. 306 (M.D. Ala. 1966); *Moses* v. *Washington Parish School Board (La.)*, E.D. La., Civil No. 15973, October 19, 1967; *Coppedge* v. *Franklin County Board of Education (N. Car.)*, 273 F. Supp. 289 (E.D.N.C. 1967) appeal pending; *Corbin* v. *County School Board of Loudoun County (Va.)*, E.D. Va., Civil No. 2737, August 27, 1967; *Braxton* v. *Board of Public Instruction of Duval County (Fla.)*, M.D. Fla., Civil No. 4598, January 24, 1967.

With regard to the "revision of school districts and attendance areas," ordered by *Brown II* the Court of Appeals for the Fifth Circuit held in *Jefferson County, supra:*

> If school officials in any district should find that their district still has segregated faculties and schools or only token integration, their affirmative duty to take corrective action requires them to try an alternative to a freedom of choice plan, such as a geographic attendance plan, a combination of the two, the Princeton plan, or some other acceptable substitute, perhaps aided by an educational park. 372 F.2d at 895-896.

The Court thus made it clear that the school board's assignment transfer, building utilization, new construction, and other policies must be specifically designed to integrate the system and eliminate identifiable Negro schools.

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[12] A survey of various types of remedies for the disestablishment of segregation is contained in the Report of the United States Commission on Civil Rights, "Racial Isolation in the Public Schools," (1967), Vol. I, pp. 140-183. This survey was commended to the school board and the district court by the Court of Appeals for the Eighth Circuit in *Kemp* v. *Beasley II*, No. 19,017, January 9, 1968, slip opinion, p. 9.

The Court of Appeals for the Eighth Circuit adopted a similar provisions in its decree in *Kelley* v. *Altheimer, supra.*

II.

The Desegregation Plan Approved by the Lower Courts Is Inadequate in That Petitioners Demonstrated That the Zoning and Transfer Arrangements Were Not Designed to Abolish the Dual System.

The school desegregation plan proposed by the Jackson, Tennessee board, including particularly the junior high school zoning arrangements and the transfer plan, fail to meet a minimum standard of adequacy under *Brown* v. *Board of Education,* 349 U.S. 294. The Jackson plan should not have been approved because there was no reasonable likelihood that the plan could effectively abolish the dual system of schools.

Petitioners' evidence showed without dispute that the junior high school zones proposed for the system were drawn so as to preserve racially segregated junior high schools to a large degree. They proposed a plan which would have desegregated all three junior high schools. There was no evidence which contradicted or impaired the value of plaintiffs' exhibit No. 20 (the same map as Exhibit V within the booklet marked overall Exhibit No. 12). This map depicts all of the Negro and white pupils of junior high school age in the city by race (Negroes in blue, whites in red dots) and shows how they are distributed in the city. The overlay containing the junior high school zone lines shows plainly how a strangely shaped zone for the all-Negro Merry school has been designed by the school authorities to include most of the Negroes in the city and exclude most of the whites. The racial effect of the junior high school zones is readily apparent from an examination of Plaintiffs' Exhibit 20.

At the same time the school board proposed the junior high school zones it took steps to enlarge the all-Negro Merry Junior High School. This enlargement was plainly designed to accommodate all of the Negroes in the city at Merry, since Jackson Jr. High School had capacity for better than 200 more students than were enrolled there, and there was also excess capacity at Tigrett Junior High. The racial purpose of this construction is further shown by the fact that the board's projections indicated no expected large increase in the number of junior high school students in the next four years.

The location of the three junior high schools (all of which were opened in the years after *Brown* on a segregated basis), the enlargement of Merry Junior High to accommodate continued segregation, and the planning of school zones separating white and Negro populations, all make an unrebutted showing of school building and school zone planning to perpetuate segregation.

The board's free transfer device operates to permit an even greater degree of segregation than could be accomplished by the school zones. Plaintiffs' Exhibit 19 (the same maps as Exhibit VI within the booklet Exhibit 12) demonstrates how the use of the combination of gerrymandered zoning and an open transfer plan at the junior high level permits a high degree of segregation. The exhibit indicates on map overlays the location of the residences of pupils attending the three junior high schools. (Note that the exhibits were prepared based on data in December 1964 when the Junior High Schools were still segregated by compulsion. The respondents arguments that these exhibits are somehow based on an effort to prove *"de facto"* segregation are thus entirely specious.) Exhibit 19 shows how relatively few children had to be transferred out of their zones to maintain a high degree of racial

separation. As we have discussed above, all of the experience in Jackson, at the time this plan was proposed showed that white pupils would transfer out of the all Negro schools if free transfers were permitted, thus leaving the all-Negro school intact as a segregated school.

The district court found that there was gerrymandering with respect to the zone lines of several elementary schools proposed by the respondent board. The court ordered that these zones be modified because of this apparent gerrymandering. Given this finding that the respondent board had once engaged in preparing school zone lines to perpetuate segregation, it was incumbent upon the district court to scrutinize the newly proposed junior high school zones all the more carefully. We submit that the trial judge, having once found that the board was guilty of gerrymandering with respect to certain proposed zones, erred in failing to consider the irregularly shaped zones proposed by the board for junior high schools to be greatly suspect. It is submitted that the evidence plainly showed the manipulation of school location, construction, and zoning policies to maintain a high degree of segregation.[13] This was sufficient to require disapproval of the board's proposed plan and for the trial court to have ordered the adoption of the proposed feeder plan suggested by plaintiffs' experts as a method of actually desegregating all three junior high schools within the framework of the existing building locations, and grade structures, and build-

[13] The availability of a transfer option, however "free", does not justify the continued practice of school assignments based on racially gerrymandered zone lines. See *Wheeler* v. *Durham City Board of Education*, 346 F.2d 768 (4th Cir. 1965) (Students assigned by racially gerrymandered zones, then granted right to transfer out. Held: "Channeling pupils into schools by a method involving discriminatory practices and then requiring them, or even permitting them, to extricate themselves from situations thus illegally created, will not be approved." 346 F.2d at 772).

ing capacities. If this feeder proposal was not adopted, at the least the court should have required some alternative method of assignment to be proposed by the board which was equally as likely as the feeder method to actually disestablish the dual system of junior high schools.

We urge that the evidence on this record is fully sufficient to justify this Court in ruling that the plan approved below was plainly inadequate under *Brown*. However, assuming *arguendo* that the record is not sufficient to support a ruling rejecting the plan as completely inadequate then the cause should be returned to the District Court for reappraisal in view of the proper standards for review of desegregation plans as discussed in part I of the argument, *supra*. The trial court's view of the evidence, the alternative proprosals made by petitioners' experts, and the entire gerrymandering and transfer plan issues was influenced by the court's too restricted view of the constitutional requirement of desegregation.

CONCLUSION

It is respectfully submitted that the judgment of the court below should be reversed.

Respectfully submitted,

JACK GREENBERG
JAMES M. NABRIT, III
MICHAEL MELTSNER
MICHAEL J. HENRY
10 Columbus Circle
New York, New York 10019

AVON N. WILLIAMS, JR.
Z. ALEXANDER LOOBY
McClellan-Looby Building
Charlotte at Fourth
Nashville, Tennessee 37201

J. EMMETT BALLARD
116 West Lafayette Street
Jackson, Tennessee

Attorneys for Petitioners

GERALD A. SMITH
FRANKLIN E. WHITE
Of Counsel